Kinyua v Murage (Civil Appeal E016 of 2023)
[2024] KEHC 7882 (KLR) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7882 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E016 OF 2023

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

ELIZABETH MUMBI KINYUA ..... APPELLANT

AND

SAMUEL WANJOHI MURAGE ..... RESPONDENT

(Being an appeal from the Judgment of Hon. E. Kanyiri (PM) in Karatina PMCC No. 44 of 2021, delivered on 27th February, 2023)

JUDGMENT

1. This is an appeal from the judgment and decree given in Karatina PMCC 44 of 2021 given on 27/2/2023 by Hon. E. Kanyiri. The appellant was the plaintiff in the lower court.
2. The appellant filed a memorandum of appeal praying as follows:-
    a. This appeal be allowed.
    b. The lower court judgement be set aside and be substituted with an order holding the respondent 100% liable for the accident.
    c. The issue of quantum be determined.
    d. The costs herein and in the lower court be awarded to the appellant.
3. The Memorandum of appeal is unseemly, prolixious and not in accordance with Order 42 Rule 1 of the *Civil Procedure Rules*, which, provides as doth: -

    " 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

4. The Court of Appeal had this to say about compliance with Rule 86 of the *Court of Appeal Rules* (which is pari materia with Order 42 Rule 1 of the *Civil Procedure Rules*) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:
>
> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR , the court of appeal observed that: -

> "Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:
>
> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

7. In the case of *Mbogo and Another v. Shah* [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

8. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus Classicus* case of *Selle and another v Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

9. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

10. The duty of the first appellate court remains as set out in the Court of Appeal for *Eastern Africa in Pandya - v- Republic* [1957] EA 336 is as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

11. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

12. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* (2019)eKLR , Justice D.S Majanja held as doth:

> "General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method

approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

13. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

14. The foregoing was settled in the cases of Butter v Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

15. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

16. The court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Servcie v. A.M Lubia & Another* 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

17. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

18. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

19. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

20. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

21. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

Pleadings

22. The appellant filed suit on 17/6/2021 for an accident on 17/6/2018 involving motor vehicle registration No. KUG 816 and KMDR 469U along Wambugu Chemist Street in Karatina. The appellant set forth injuries suffered as doth: -

    a. Cut ligaments at left knee.

    b. Limitation of joint range of movement at knee.

    c. Extensive scars at knee joint.

    d. Nerves around knee affected causing numbness.

    e. Swelling around left knee – around 3 cm.

    f. Instability of left knee – leading to inability to carry heavy loads.

23. He pleaded special damages of Kshs. 30,800/-. They stated that the appellant was a pillion passenger in the motor cycle registration No. KMDR 469U and was hit by Motor Vehicle Registration No. KUG 816 Toyota Pickup.

24. An amended plaint was filed changing the special damages from Kshs.30,800/= to Kshs.239,340/- .The respondent filed defence and blamed the appellant. He stated that it is motor cycle registration No. KMDR 469U that abruptly entered his lane.

Evidence

25. The appellant testified on 26/9/22. He stated that she alighted and a vehicle came and broke her leg. The said motor cycle is said to have placed appellant beside the road. They stated that the motor cycle had already stopped. Dr. Zacharia testified on the injuries and produced the report. He classified 20% disability to 60% contracture, that is, inability to switch because joints can't move. He stated that at the time of examination the injuries were 3 years old.

26. DW1 Eliud Wachira Wanjohi testified and adopted his statement. He stated that he stopped to give way as the vehicle came from Industrial area and hit the passenger on the cycle. One ran off but he took the passenger to hospital. He blamed the rider.

27. He stated that he did not own the vehicle. It makes no difference as he was driving.

Analysis

28. The appellant pleaded that the respondent is to blame. The respondent pleaded that the appellant is to blame. At the end of the day the respondent blamed the motor cyclist, who is not party to the suit. The passenger is not vicariously liable for the actions of the driver or a rider.

29. It is important that parties respect pleadings. Therefore, parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. v. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v. Nigeria Breweries PLC SC* 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > " .....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

30. In the case of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered

to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

31. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of *Raila Amolo Odinga & Another v. IEBC & 2 others* (2017) eKLR found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

32. The respondent was blaming the driver who was not party to the suit. The court cannot apportion liability between parties who were not party to the suit. The rider was not joined and as such I cannot apportion liability. The evidence led showed the respondent was to blame. Had he thought for once that the Rider is to blame, he ought to have done one of the following: -

a. Join the rider as a party, and

b. Plead and prove the rider was to blame.

33. Particulars pleaded was contributions negligence of the appellant. No such evidence was led. He then brings me back to the place of pleadings. There was a pleading that the respondent is to blame. Circumstances of the case are crucial in determining the natural cause of events. In the case of *Berkley Steward v Waiyaki* Vol 1 KAR 1118 {1986 – 1989} it was held:

> "Under Section 119 of the *Evidence Act*, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case."

34. In the case of *Caparo Industries PLC v Dickman* {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298 the determinants of negligence were stated as follows:

> "The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused ...
>
> What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

35. The burden of proving contributory negligence on the part of the plaintiff is on the defendant. in *Embu Road Services v Riimi* (1968) EA22 and 25 *Mzuri Muhhidin V Nazzar Bin Seif* (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962 the court stated hereunder: -

> "Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence".

36. A finding on contributory negligence must be based on facts. The court will be slow to interfere with such finding unless it is based on no evidence or the court below was simply wrong. In *Jones V Livox Quarries Ltd* [1952] 2 QB608 the Court of Appeal stated that; -

> "An appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of the apportionment by the trial court. In such circumstances the appellant Court may reassess the apportionment if it is satisfied that the assessment made by the Judge was plainly incorrect"

37. In the case of *MacDrugall App v Central Railroad Co.* Rbr 63 Cal 431 the court held that; -

> "In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence"

38. In *Grace v Australian Knitting Mills Ltd* [1938] AC 85 the court stated: -

> "It is clear that the decision in Donoghurt case treats negligence, where there is a duty to take care, as a specific tort in itself and not simply as, an element in some more complex relationship or some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of action able negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however essential in English Law that the duty should be established: The mere fact that a man is injured by another's act gives in itself no cause of action. If the act is deliberate, the party injured will have to claim in Law even though the injury is interment, so long as the other party is merely exercising a legal right if the act involves lack of due care, again no case of actionable negligence, will arise witness the duty to careful exists.

39. In the case of *Alfred Chivatsi Chai & another v Mercy Zawadi Nyambu* [2019] eKLR, Nyakundi R J, stated as follows: -

> "By reason of the said duty of care, the same standard of care underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well that of others. When it comes to contributory negligence and res ipsa loquitor the test can be followed.

In the case of *Benner v Chemical Construction Ltd* [1971] 3 ALL ER 822 where the Court of Appeal said in a Judgment by David C. J –

> " In my view it is not necessary for the doctrine to be pleaded, if the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants,that it is for the defendants to explain and show how the accident could have happened without negligence."

Further in *Lodigelly Iron Coal Co. Ltd v Mcmillan* [1934] A.C.

> " The court held it in strict legal analyses negligence means more than heedless or careless conduct whether in omission or commission. It properly connotes the aspect concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

40. In the case of *Obala v Okello & 2 others* (Civil Appeal E022 of 2022) [2022] KEHC 15762 (KLR) (22 November 2022) (Judgment), Justice Aburrili stated as follows: -

> " It is also worth noting that it was the appellant who introduced the aspect of a third party in the proceedings and therefore, under those circumstances, it was incumbent upon the appellant, if her case was that a third party was to blame for the accident, to enjoin the said third party as she had already alluded to in her own pleadings."
>
> I find that the appellant was under an obligation, if she felt that someone else was responsible for or contributed to her predicament in the case, to enjoin that someone else as a third party, following the procedure laid out in the law, so that she can claim from him any loss or award that she may suffer, should the case be determined in favour of the respondent. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear or be made parties to proceedings before it.

39. In the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd* (2015) eKLR, it was held that: -

> "In law, a third party is enjoined in a suit at the instance of the defendant and through the set procedure under order 1 rule 15-22 of the Civil Procedure Rules. And, liability between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant and has given directions under order 1 rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the plaintiff and the defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out."

41. The case of *Stella Nasimiyu Wangila &another v Raphael Oduro Wanyama*(2016) eKLR where the court held that: -

> " The owner and driver of the said pick-up registration No KAY 651A are not parties in this case. The defendant had an option and opportunity to enjoin that party to the suit – See order 1 rules 15 of the Civil Procedure Rules. He did not do so. A court cannot adjudicate on

issues touching a party or pass judgment against a party who is not a party in a suit. Failure to join the party that the defendant blames for the accident as a third party or a necessary party and or seek indemnity from that party has a legal consequence."

42. The evidence in respect thereof was not rebutted. As such I find and hold that the respondent was 100% liable in the circumstances, I find no basis for finding the Appellant liable.

43. I set aside judgment of the court below and substitute with an order finding the Respondent 100% liable. The court had no jurisdiction to find the owner of KMDR 469U liable without being party. By finding a non-party liable, the court veered off and went into its own frolics.

44. The court did not assess damages. It is the duty of the court to assess damages even where the court dismisses a case. In *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal posited as follows: -

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see *Butt v Khan* [1981] KLR 349)."

45. The court was under duty to assess damages. It cannot just throw damages to the court. In *Lei Masaku versus Kalpama Builders Ltd* [2014] eKLR, the court noted as follows: -

> " It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

46. The appellant pleaded the following:

    a. Medical expenses Kshs36,340/-

    b. Medical report Kshs.5,000/-

    c. Transport to hospital Kshs.48,000/-

47. Transport was not germane and did not arise from the accident. It is not foreseeable. In the circumstances I dismiss a claim for taxi to and from hospital. Transport is a private arrangement and is not taken into consideration in a war of damages.

48. They clarified that doctor provided a receipt of Kshs.4,000/- not 5,000/-. The same is awarded as few receipts were provided for consultation, dressing, bandages. Medical expenses of a sum of Kshs.16,640/- was proved.

49. Dr. Jocelyn Nyokabi prepared a medical report dated 8/10/2018. She found joint effusions, extensive subcutaneous edema was noted.

50. The good doctor formed an opinion that there was transverse tear of the anterior horn of the lateral meniscus. There was also edema and small joint effusion. The good news was that there was no osseous or cartilaginous abnormality.

51. The doctor indicated that a sum of Kshs.150,000 is required including of physiotherapy.

52. The same were provided, awarded the same on the general damages. The court is aware that no amount of damages can restore the joints. In the case of *H West and Son Ltd v Shepherd* (1964) AC 326 the House of Lords in England stated that:-

> "... but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional ..."

53. The report by Mr. Zackary G. Muriuki stated that about Ksh.150,000/- is required for physiotherapy rehabilitation.

54. The injuries suffered as per the medical report are:

    a. Deep cut wounds on patella and lower 1/3 left femur above the knee anterior surface.

    b. A deep cut wound left leg inner side of the upper thigh.

    c. Effusion and extensive oedema on the left knee resulting in pain and restriction of the joint movement.

    d. Left knee sustained transverse tear of the anterior horn of meniscus. MRI imaging left knee confirmed the damage of the knee cruciate ligaments.

55. Though a sum of Kshs.700,000/- was submitted by the appellant and Kshs.50,000/- by the Respondent, a sum of Kshs.600,000/- was sufficient. On the other hand the appellant claimed loss of income. This is called lost earnings.

56. They are of the nature of special damages. They must be specifically proved. The principles to be considered in making an award for loss of earning capacity were set out by the Court of Appeal in *Butler v. Butler* [1984] KLR 225, as follows:-

    a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;

    b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;

c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;

e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

57. Therefore, the claim for loss of earnings is unmerited. So long as parties continue confusing lost earnings with loss of earning capacity they shall continue being dismissed. In this case the appellant has substantially succeeded.

58. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

59. Section 27 of the *Civil procedure Act* provides as follows: -

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

60. The Appellant has largely succeeded. They are awarded costs of 95,000/-.

Determination

61. In the circumstance I make the follower orders: -

a. The appeal is allowed, judgment and orders in the lower court is set aside and in lieu thereof;

i. Liability 100% against the respondent

ii. The award for lost income is dismissed

iii. The appellant is awarded Kshs.600,000/-

iv. Special damages – Kshs.16,640/-

v. Future income expenses – Kshs.150,000/-

vi. Sub-total – Kshs.766,640/-

b. Costs of Kshs.95,000/- to the appellant

c. Stay of execution for 30 days.

d. Right of appeal 14 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellant

Wambui Gitau for the Respondent

Court Assistant - Jedidah